

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.90 OF 2005

The United India Insurance Company Ltd. ...Petitioners.

vs.

Jaisu Shipping Co.Pvt.Ltd. ...Respondents.

Mr.A..Vernekar for the Petitioners.

Mr.H.H.Trivedi with R.K.Dave, for the Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 4th October,2005

P.C.:-

1. By this petition, the petitioners challenge the Award made by the sole Arbitrator directing the petitioner to pay amount of Rs.38,95,000/- with interest to the respondents. The facts that are relevant and material for deciding this petition are that the respondents are the owners of the vessel known as “Kamal XXV” On 9th June,1998 it was anchored to buoys in the middle of the Kandla

Channel. At about 12 hours, there was an outbreak of a severe cyclone, with high tidal waves causing large scale devastation in the area. The vessel Kamal XXV broke free, due to the high winds and drifted and came to be grounded north of a creek (Chakkar Creek). The mouth of the creek near the channel was obstructed due to the presence of another vessel, the Hualien Express, which was also grounded. On 14.6.1998, the vessel stern was touching the Chakkar Creek. An attempt was made to use her engines to manoeuvre herself, but could not make headway, due to the presence of the Hualien Express. The respondents had to dredge the channel with the help of their other two vessels. Finally, on 22nd July, 1998, the vessel began to ease herself into the dredged channel, using her own main engines, but with the assistance of the other two vessels of the respondents. The vessel was insured with the petitioners and therefore, the claim was made for reimbursement of the expenses and for the services rendered by two vessels owned by the respondents for salvage. The petitioner had appointed Surveyor. The Surveyor has given estimated cost of salvage at Rs.88,95,000/-. The petitioners by letter dated 30.12.1999 offered an amount of Rs.50 lakhs on account payment and also expressed willingness to make payment of balance amount as per the estimate of the Surveyor after the documents are submitted for verification. These documents were regarding the cost of salvage of vessel. After the arbitration clause was invoked, there was an objection raised to the

jurisdiction of the Arbitral tribunal. It was claimed that what was carried on was the operation covered under clause (13) and not the operation covered by clause (9). It is pointed out that in so far as operation under clause (9) is concerned there is an arbitration clause and so far as operation under clause (13) there is no arbitration clause. The learned Arbitrator has held that the operation that was carried out for salvage of vessel was under clause (9), the salvage has to be carried out under the Maritime Law till the vessel is in danger. The learned Arbitrator on the basis of the evidence on record viz. oral evidence has come to the conclusion that the vessel was in danger and therefore, the salvage carried out was covered by clause (9) which clearly provides for arbitration.

2. So far as the damages are concerned, the learned Arbitrator relying solely on the surveyors report has held that as the petitioners itself had offered amount of Rs.88,95,000/-, the petitioners were bound by that and the learned Arbitrator has directed the petitioners to make payment of that amount. The learned Counsel appearing for the petitioners challenges the Award made by the learned Arbitrator on the aspect of the jurisdiction as also on damages.

3. So far as the aspect of jurisdiction is concerned, it is clause (9) which is relevant. Clause (9) comes into operation if the vessel is

under salvage. The learned Arbitrator has held that for carrying on salvage operation, it must be found that the vessel was in a situation of danger. The learned Arbitrator relying on the evidence on record has taken the view that the vessel was in a situation of danger, if a rescue operation had not been carried out it would have broken down and therefore, the finding that has been recorded by the learned Arbitrator is the finding of the fact which cannot be disturbed by this Court, and therefore, the finding recorded by the learned Arbitrator that the matter is within the jurisdiction of the Arbitrator, cannot be disturbed.

4. So far as the finding in relation to the damages, the submission of the learned Counsel appearing for the petitioners is two fold. Firstly, according to him, the entitlement of the claimant-respondents to the claim was to be worked out on the basis of the English Law. In other words, the substantive Law, according to the petitioners is the English Law and the rights and claims of the parties are to be worked out as per the English Law and because the Arbitration was to take place in India and the English Law being a foreign Law, it was a question of fact and therefore, it was necessary for respondents to plead the relevant provisions of the English Law in relation to entitlement of the respondents to damages and in relation to manner in which the damages are required to be proved. According to the petitioners, in the claim statement there are no pleadings

regarding the Law in England in relation to determination of damages and how the damages are to be proved and on whom the burden of proof lies. It is the submission of the petitioners that in the absence of pleadings as to the English Law, relying merely on the Surveyor's Report which was the estimate of the expenses incurred, the learned Arbitrator could not have made the Award. It is further submitted that what the respondents were claiming was the expenditure incurred by it for salvaging the vessel and as that expenditure was incurred by the respondents, the facts relating to the salvage operation made, were in the special knowledge of the respondents. Therefore, the burden of proof was entirely on the respondents to lead primary evidence to establish the expenditure incurred by it in salvaging the vessel. According to the learned counsel, the learned Arbitrator has not at all taken into consideration that the report submitted by the Surveyor on which the respondents were relying was merely an estimate given by the Surveyor. At best the report of the Surveyor could be relied on as a secondary evidence. By no stretch of imagination, the report of the Surveyor can be relied on as primary evidence to prove the expenditure incurred by the respondents for carrying out the salvage operation.

4. The learned Counsel appearing for the respondents on the other hand submits that so far as the aspect of the English Law is

concerned, that has been taken into consideration by the learned Arbitrator in the Award. The learned Arbitrator has held that there are necessary pleadings available on record. So far as the other aspect of the matter is concerned, the learned Counsel submits that it is true that the report of the Surveyor was the estimate of expenditure incurred by the respondents for salvaging the vessel. The petitioners by letter dated 30.12.1999 had offered to pay Rs.50 lakhs as on account payment and had also agreed to make payment of balance amount on verification of the documentary evidence produced by the respondents. According to the learned Counsel, the documentary evidence was accordingly produced by the respondents before the petitioners and the petitioners were satisfied about the expenditure that was incurred by the respondents and therefore, it was not necessary for the respondents to produce any evidence before the learned Arbitrator and mere reliance placed on the report of the Surveyor was enough.

5. So far as the aspect of lack of pleadings in relation to the English Law is concerned, the learned Arbitrator in paragraph 10 has referred to the submission made on behalf of the petitioners that the English Law being a Foreign Law was required to be pleaded. The learned Arbitrator has held that the necessary pleadings of the English Law are being found in paragraph no.6, 7 and 9 of the Statement of

Claim. Perusal of paragraph no.6 of the Statement of Claim shows that the pleadings in that paragraph are about what is termed as salvage under the English Law. The pleadings in paragraph no.7 shows as to what can be under the English Law be termed as danger to the vessel. Perusal of paragraph 9 of the Statement of claim shows that the pleadings are again in relation to the necessity of salvage operation. None of the paragraphs viz. paragraph nos.6,7 and 9 show that the respondents have pleaded the English Law as regards awarding of damages and computation and determination of damages and also the English Law as regards as to on whom the burden to prove damages lies. In my opinion, therefore, the Award made by the learned Arbitrator in the absence of any such pleadings clearly suffers from non application of mind.

6. So far as the merits of the matter are concerned, perusal of the Surveyor's report on which sole reliance is placed by the learned Arbitrator in making the Award in favour of the Respondents, shows that it was only the estimate of the expenditure that may be required to be incurred by the respondents in carrying out the salvage operation. What is the actual expenditure incurred by the Respondents in order to carry out the salvage operation was a fact within the special knowledge of the respondents, and therefore, at least, according to the Indian Law the respondents were under a duty to produce before the learned

Arbitrator primary evidence to prove the expenditure incurred by it in carrying out the salvage operation. The respondents were not at all justified in relying on the report of the Surveyor as the only evidence in support of its claim. The Award made by the learned Arbitrator in this regard, in my opinion, clearly suffers from ignoring the elementary principles regarding the burden of proof and how that burden of proof is to be discharged. The respondents had not led any evidence to prove the expenditure incurred by the respondents in salvaging the vessel and therefore, merely relying on the report submitted by the Surveyor which was the estimate of the expenditure, no award could have been made. The fact that the respondents had produced documents before the petitioners to satisfy the petitioners that the respondents had incurred expenditure, in my opinion, was not enough. Once the petitioners denied its liability to make payment of damages, the burden was entirely on the respondents to prove damages and that burden could have been discharged only by producing primary evidence which was in the special knowledge of the respondents. Taking any view of the matter therefore, the Award made by the learned Arbitrator cannot be sustained and has to be set aside. In the result, therefore, the petition succeeds and is allowed. The Award made by the learned Arbitrator is set aside. The respondents are directed to pay cost of this petition to the petitioners as incurred by the petitioners.

